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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-341

KENNY C. GUINN, Superintendent of Schools,
Clark County School District, *et al.*,

Petitioners,

VS.

HERBERT E. KELLY, SR., *et al.* and LEAGUE OF WOMEN VOTERS OF LAS VEGAS VALLEY, a Non-Profit Organization.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO CERTIORARI

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Opinions Below

The opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the district court's desegregation order is now reported at 456 F.2d 100. The district court opinions and orders herein are unreported and are reprinted in the Appendix to the Petition.

Jurisdiction

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254(1). The judgment of the Court of Appeals denying rehearing was entered on April 3, 1972. On June 3, 1972, Mr. Justice Douglas extended the time for filing the Petition to and including August 31, 1972.

Questions Presented

1. When school authorities by conscious choice make decisions affecting the location, grade structure and capacity of school buildings, the size and perimeters of attendance zones by which students are assigned to these schools, and the assignment of faculties and staffs to those schools, all of which result in the maintenance and increase of racially identifiable and segregated schools, does the absence of an explicit state-wide mandate compelling such segregation render the school authorities' actions lawful?

2. May a federal district court devising a remedy for Fourteenth Amendment violations in accord with the principles of *Swann* v. *Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971), require—where there are no practical difficulties of the sort envisaged in *Swann*—that the plan be designed so as to avoid assignment of more than 50% black students to any school in a system wherein black students make up only a small proportion of the total student population?

Statement

This school desegregation action was commenced against the Clark County School District, Nevada, in 1968. Following a hearing and finding of illegal segregation, the district court retained jurisdiction and permitted the school board to attempt to comply with its responsibility to eliminate that segregation by implementing an open enrollment or free choice plan. In 1970 the court reviewed progress under the plan at an evidentiary hearing and ordered adoption of new measures incorporating mandatory assignment of pupils to the end that no Clark County

district school should be more than 50% black. (With respect to faculty, the court held that injunctive relief was not required because the board had adopted policies which promised effectively to redress the previous disproportionate assignment of black teachers to black schools in the district).

Following this Court's decision in *Swann, supra,* the district court reconsidered its decision in light thereof pursuant to a remand from the Court of Appeals for that purpose, and reaffirmed its holding that the Clark County School District was constitutionally obligated to desegregate its schools. The Court of Appeals affirmed, holding that the guidelines in *Swann* had been properly applied.

Statement of Facts

At the time this lawsuit was filed, some 4,978 black students attended six westside Las Vegas elementary schools, each of which was over 95% black in student enrollment (10/68 Tr. 199, 388, 412; DX 17)[1] and each of which had a faculty disproportionately black in comparison to other schools in the system DX 16). The students attending these schools were, on the average, a year behind the students attending predominantly white Las Vegas schools in achievement test scores (10/68 Tr. 413; 5/69 Tr. 48).

At the secondary level there was no school in which similar numbers of black students were concentrated. A predominantly black westside junior high school had been closed in 1956 (10/68 Tr. 200) and its students dispersed to other schools in the system (10/68 Tr. 150-51). At that time as well, some of the now-black westside elementary

[1] Citations are to the original record before the Court of Appeals, which respondents have requested be transmitted to this Court. Transcript citations are identified by page and date of hearing.

schools had significantly larger white enrollments (*e.g.*, 10/68 Tr. 200). However, although the white and black school population of the district subsequently grew about the same rate, black students at the elementary level were increasingly isolated in heavily black westside elementary schools.

There were, of course, a variety of factors which brought about this result. Housing in the Las Vegas area was tightly segregated and Negroes were generally confined to the west side,[2] a fact known to the school authorities (10/68 Tr. 73, 220, 258, 451; 8/70 Tr. 83). Yet the district closed schools on the fringe areas of the westside Negro community (6/71 Tr. 100-01) and replaced them with new elementary schools built in the heart of black areas (10/68 Tr. 201; 5/69 Tr. 302). At the same time, federally assisted low-income housing projects on the west side swelled the impaction of black residents (*e.g.*, 10/68 Tr. 251, 314-15; 8/70 Tr. 160; *cf.* 8/70 Tr. 50); it has been only very recently that such projects have begun to be located outside the traditionally black westside area (6/71 Tr. 70-71).

The school district claims to have been following a "neighborhood school policy" in these matters, merely responding to the demands of local growth in determining both its site locations and its school attendance policies. However, it is significant that at the time of the hearings there were only six "neighborhood" schools in the Las Vegas area to which no students were bused; five of these were black, westside elementary schools (6/71 Tr. 237, 239). Under the district's attendance plan, considerable numbers of white students were transported to school buildings

[2] Nevada passed an open housing statute in 1970 (6/71 Tr. 48), two years after the federal Fair Housing Act of 1968 went into effect. See also *Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968). But the effects of racially discriminatory housing practices are longstanding. See 10/68 Tr. 221.

other than those closest to them (5/69 Tr. 121; 8/70 Tr. 221; 6/71 Tr. 237), including white students being transported to white schools and by-passing one of the black west side schools (5/69 Tr. 96, 122-23; 6/71 Tr. 301; *see* 10/68 Tr. 428-29).

The school district says it did not take the racial effect of its school construction policies into account until 1966 when it determined to build no more black schools on the west side[3] (10/68 Tr. 330, 354); however, its new facilities have generally not been filled to capacity when they open (10/68 Tr. 163; 8/70 Tr. 394) and school construction generates increased settlement in the immediate area (10/68 Tr. 372, 379; 5/69 Tr. 258). In the context of residential segregation in Las Vegas, therefore, the district's construction policies made the situation worse. As recently as 1969, the district was building a new school in a white suburb to relieve overcrowding at nearby white schools (5/69 Tr. 107-08) although black schools were underutilized (10/68 Tr. 143, 168-69).

The school district also helped to create and maintain the pattern of racially identifiable schools by restricting the transfer right of black students at the westside schools (10/68 Tr. 80, 254) and by failing to utilize yearly attendance zone changes to increase desegregation (*compare* 10/68 Tr. 163, 8/70 Tr. 367 *with* 6/71 Tr. 301). Traditionally it has assigned its few black elementary teachers to the westside schools (*e.g.*, R. 115); the district had never *assigned* a black teacher to a white school before 1969 (after this action was filed) (10/68 Tr. 438). The school district recently has undertaken an extensive renovation program at the westside schools in order to "make them

[3] Jo Mackey Elementary opened in 1965 and C.V.T. Gilbert in 1966 (10/68 Tr. 142, 151).

equal to other schools in the District . . ." (10/68 Tr. 354; 8/70 Tr. 229).

Reasons Why the Writ Should Be Denied

The School Board's primary contentions in support of its request for review of this matter seem to be that the courts below wrongly decided factual issues concerning the responsibility of school authorities for segregation in Clark County and that the decision is in conflict with rulings of other Courts of Appeals.

In its Statement of the Case and in general throughout the Petition, the District attempts to characterize its operations as merely following a neutral, neighborhood school doctrine. The courts below explicitly held that this was not the case in Las Vegas:

> This is a clear finding that the school board furthered racial segregation by official conduct beyond the mere adoption and administration of a neutral, neighborhood school policy. [footnote omitted] This finding is supported by the record, and establishes a constitutional violation.

456 F.2d at 106 (Appendix to Petition at p. 10). The Court of Appeals reviewed the findings of the district court which justified the conclusion that Clark County school authorities knowingly took actions which resulted in the establishment, maintenance, or aggravation of segregated schools on the westside of Las Vegas. See 456 F.2d at 106-08 (Appendix to Petition at pp. 10-13). Additional evidence relied upon by the plaintiffs was not directly used by the Court of Appeals to buttress its conclusion because the district court had not made findings thereon, but examination of the record will make apparent the solid basis upon

which the district court made its finding of constitutional violation. See 456 F.2d at 105, n.4 (Appendix to Petition at p. 7).[4]

There is some language in the opinions of the district court which is ambiguous because it employs the "de facto" school segregation terminology. The Court of Appeals properly viewed the lower court's order as being grounded upon a correct interpretation of the law as enunciated by this Court in *Swann, supra*, irrespective of the terminology employed. See 456 F.2d at 106, n.6 (Appendix to Petition at p. 9).

The arguments in the Petition can be reduced to the simple assertion—which the District in fact made below—that the Constitution applies only to States which compelled segregation by statute. But such statutes merely make the proof of state-created segregation relatively simple; they do not delimit the reach of the equal protection clause. "De jure" segregation can still be proved—as in this case—by showing official action resulting in segrega-

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[4] Attached to this Brief as Appendix A we have reproduced a Supplemental Brief filed following oral argument below, which describes some of the evidence demonstrating how this school district

> since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns . . . [and built] new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of "neighborhood zoning."

Swann, supra, 402 U.S. at 21. The Supplemental Brief also discussed the construction of new black schools in areas of black concentration and the drawing of attendance boundaries so that the new schools continued to serve only that part of the school district formerly served by the older black schools, and the school system's failure, while it "continually adjust[ed] attendance boundaries of schools" (Petition, p. 11) to ameliorate racial segregation in Las Vegas schools.

tion or discrimination in the absence of statute, as such discrimination can be proved in, for example, jury discrimination cases. Thus, *Swann* cannot be read in the narrow way that the District suggests. This Court was, of course, dealing with segregation originally imposed pursuant to statute. But the lengthy discussion of issues such as school placement, attendance zones, and faculty ratios makes it clear that constitutional violations arise by school board actions that create or perpetuate segregation even in the absence of a statute.

This case involves a school district in which segregation has been brought about and maintained by regular, systematic and deliberate choice of the school authorities. While the district court may have labelled the school system's stubborn adherence to a "neighborhood school policy" in the black westside schools (R. 513), or its deliberate construction of new "neighborhood" (and consequently black) schools in that area (R. 514), "de facto" segregation (10/68 Tr. 501) because neither had Nevada law ever required segregation nor had the school district ever openly advocated it as formal policy, the lower court's order was specifically grounded upon the official action of the school district in maintaining and aggravating segregation long after *Brown* v. *Board of Educ.*, 347 U.S. 483 (1954) (R. 514; Appendix to Petition at p. 26).

Not only are Petitioners seeking to controvert factual findings clearly supported by the record, but they have conjured up non-existent conflicts with the decisions of other Courts of Appeals in an effort to create issues meriting the review of this Court. For example, in *Keyes* v. *School District, No. 1, Denver*, No. 71-501 (argued October 11, 1972), the Denver school system made the same argument advanced by the Petitioners below respecting segregation of its Park Hill area schools: that it followed a

neighborhood school policy which required it to construct new schools in this region of increasing black population despite the availability of classroom space elsewhere in the system. The Denver district court held that the reasonably foreseeable result of the policies knowingly adopted by the school board—segregation—imposed upon the Board the constitutional obligation to eliminate that segregation. The Court of Appeals affirmed on this issue and this Court has not acted upon the school board's cross petition for certiorari as to this matter, No. 71-572. The standard applied by the district court and the Tenth Circuit in *Denver* is precisely the standard applied by the courts below in measuring the constitutionality of the Clark County School District's policies and practices resulting in segregation.

As we noted above, the courts below specifically found that the Clark County School District authorities were not innocently pursuing a neutral, neighborhood school policy which resulted in racial imbalance in existing schools solely because of population changes. That distinguishes this case from *Deal* v. *Cincinnati Bd. of Educ.*, 369 F.2d 55 (6th Cir. 1966), *cert. denied*, 389 U.S. 846 (1967), 419 F.2d 1387 (6th Cir. 1969), *cert. denied*, 402 U.S. 962 (1971) and *Spencer* v. *Kugler*, 326 F. Supp. 1235 (D.N.J. 1971), *aff'd* 404 U.S. 1027 (1972), in each of which there was no finding that segregation resulted from the actions of school authorities.

The Fifth Circuit cases cited at pages 21 and 22 of the Petition, as purportedly giving rise to a conflict among the Circuits, were all decided prior to this Court's ruling in *Swann, supra,* and their limited remedies are insufficient under the principles of *Swann.* Indeed, these decisions were relied upon in *Davis* v. *Board of School Comm'rs of Mobile County*, 430 F.2d 883, 889 (5th Cir. 1970), *rev'd in part*, 402 U.S. 33 (1971), and the limited desegregation plans they approved have been altered since *Swann. Com-*

pare Ellis v. *Board of Public Instruction of Orange County,* 465 F.2d 878 (5th Cir. 1972); *Mannings* v. *Board of Public Instruction of Hillsborough County,* Civ. No. 3554-T (M.D. Fla., May 11, 1971).

The Courts of Appeals are in agreement that actions such as those of the Clark County School District which perpetuate or result in school segregation violate the Fourteenth Amendment to the Constitution. *Davis* v. *School Dist. of Pontiac,* 309 F. Supp. 734 (E.D.Mich. 1970), *aff'd* 443 F.2d 573 (6th Cir.), *cert. denied,* 404 U.S. 913 (1971); *Cisneros* v. *Corpus Christi Ind. School Dist.,* 5th Cir., No. 71-2397 (August 2, 1972); *United States* v. *School Dist. No. 151,* 286 F. Supp. 786 (N.D. Ill. 1966), *aff'd* 404 F.2d 1125 (7th Cir. 1968), 301 F. Supp. 201 (N.D. Ill. 1969), *aff'd* 432 F.2d 1147 (7th Cir. 1970), *cert. denied,* 402 U.S. 943 (1971); *cf. Brewer* v. *School Bd. of Norfolk,* 397 F.2d 37 (4th Cir. 1968); *Henry* v. *Clarksdale Municipal Separate School Dist.,* 409 F.2d 682 (5th Cir.), *cert. denied* 396 U.S. 940 (1969); *Sloan* v. *Tenth School Dist. of Wilson County,* 433 F.2d 587, 589 (6th Cir. 1970); *Clark* v. *Board of Educ. of Little Rock,* 426 F.2d 1035 (8th Cir. 1970), 449 F.2d 493 (8th Cir. 1971); *United States* v. *Board of Educ.,* 429 F.2d 1253 (10th Cir. 1970).

There is no singular issue in this case which merits the attention of this Court.

CONCLUSION

WHEREFORE, for the foregoing reasons, Respondents pray that the Writ be denied.

Respectfully submitted,

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